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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904. *No. 339.*

JAMES C. CORRY

vs.

THE MAYOR AND CITY COUNCIL OF BALTIMORE ET AL.

IN ERROR TO THE COURT OF APPEALS TO THE STATE OF MARYLAND.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This cause is brought on a writ of error to the Court of Appeals of the State of Maryland. The plaintiff is a citizen and resident of the State of Pennsylvania. He is a stockholder of the New York and Baltimore Transportation Line, one of the defendants, a Maryland corporation, incorporated by special act (1847, chap. 112.)

The revenue laws of the State provide for the taxation of resident and non-resident stockholders, the method of assessment and collection. These laws are set forth in the argument.

The State and the Mayor and City Council of Baltimore levied and were about to enforce the collection of the tax. The plaintiff filed his bill in the Circuit Court of Baltimore City seeking to enjoin the several revenue officers of the State and the Mayor and City Council of Baltimore from proceeding to collect the tax on two grounds:

(1) that the tax was a tax *in personam* on him a non-resident;

(2) that the tax was assessed without notice to him.

To this bill a demurrer was filed. Upon hearing the bill was dismissed. On appeal to the Court of Appeals the decree of the lower Court was affirmed (Corry vs. Mayor, etc., 96 Md. 310.) The plaintiff then sued out the writ of error.

SPECIFICATION OF ERROR.

The Court erred in deciding that Secs. 159 and 162 of Art. 81, Code 1888, Rev. 1903, providing for a tax on non-resident shareholders are valid. These sections impose on a non-resident a personal obligation without notice to him and are in conflict with the Constitution of the United States and the Fourteenth Amendment thereto.

Concretely stated, the whole issue is:

The validity of an Act of the Maryland Legislature, which imposes upon a non-resident holder of local property, without notice to him, a *tax in personam;* which tax has no real relation to the value of his property, and may, for a single year, exceed the total value of his property in the State.

ARGUMENT.

For the purpose of argument, it will be convenient to separate and consider in the following order the questions of law involved.

I.

That the sovereign power of taxation extends to persons residing and property situate within its boundaries. While it includes the right to tax in rem the local property of a non-resident, it does not include the right to impose a tax in personam, or a personal obligation on the non-resident himself.

There are several considerations involved in this contention, which may be properly adverted to preliminarily to the discussion of the contention itself.

1st. The contention involves the extent of the power of the State; its very existence with reference to a particular subject-matter and not merely the extent or regularity of its exercise; not whether the exercise of the power by Legislature is regular, but whether it is *intra or ultra vires, i. e.*, whether the entire legislative Act is a nullity.

2d. The consideration of this contention should not be influenced by any doubt as to whether the Act does really impose a tax *in personam;* or whether, notwithstanding the form of expression used in the Act, the tax which it imposes on the non-resident person on account of his property really differs from a tax on the property itself, *i. e.*, whether it is not really a tax *in rem.* This question is treated later.

By the term "tax *in personam*" used in this connection we mean a tax which is as much a tax on the person as a poll or capitation tax; as it is to this class of taxes that we contend the tax in question by virtue of its principles and effect belongs.

3d. In order to more accurately define our contention we concede for the purposes of this discussion:

(*a*) That a State has the power to fix for purposes of taxation the situs of all shares of stock of a domestic corporation at the domicile of the corporation.

(*b*) That it has the power to levy a tax *in rem* on such shares.

In the opinion of the Court of Appeals of Maryland on this topic, the right of the State to so fix this situs was

treated as the only question involved. (96 Md. 310 and 322.) A number of decisions of this Court were cited by the Court in its opinion. Each of these cases involves merely the question of the power of the State to localize the particular class of intangible property sought to be taxed. The right to fix the situs of shares of stock has, however, been sustained by this Court in a number of cases, among others—

Tappan vs. Merchants Bank, 19 Wall. 490.
Travelers Insurance Co. vs. Connecticut, 185 U. S. 364.

The right as to a variety of other classes of intangible property has been sustained in the following cases:

Board vs. Comptoir Natl. 191 U. S. 388.
Blackistone vs. Miller, 188 U. S. 189.
Brestol vs. Washington, 177 U. S. 133.
New Orleans vs. Stempel, 175 U. S. 309.
Savings Society vs. Multnomah Co. 169 U. S. 421.
Kirkland vs. Hotchkiss, 100 U. S. 491.

We have cited these cases for the reasons that they formed the basis of the appellee's contentions. As these cases determine only the particular class of intangible property which may be given a situs, other than the owner's domicile, and as we concede that shares of stock may be so localized, they decide only a conceded proposition and are immaterial.

This brings us to the discussion of the contention.

The extent of the taxing power and the subjects of taxation have been so often defined by this Court as to make an extended citation unneccessary. In general terms the power is defined as follows:

> "A State can no more subject to its power a single person or a single article of property whose residence or legal situs is in another State, than it can subject all the citizens all the property of such other State to

its power. The accidental circumstance that it may happen to have the means of reaching one and not the rest can make no difference."

Cooley on Taxation, 3d. Ed. 249; 2d, Ed. 555, 159.

Quoted and approved by this Court in:

Louisville Ferry Co. vs. Kentucky, 188 U. S. 385, 397.

Dewey vs. Des Moines, 173 U. S. 193, 204.

"It is obvious that it (the power of taxation) is an incident of sovereignty and is co-extensive with that to which it is an incident. All subjects over which the sovereign power extends are objects of taxation; but those over which it does not extend are upon the soundest principles exempt from taxation."

McCulloh vs. Maryland, 4 Wheaton, 316, at 429.

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State."

State Tax Foreign Held Bonds, 19 Wall. 319.

The same definition was made in the following cases:

Fargo vs. Hart, 193 U. S. 490, 500.

Commonwealth vs. Standard Oil Co., 101 Pa. St. 119, quoted and approved in—

Gloucester Ferry Co. vs. Pa., 114 U. S. 196, at 208.

St. Louis vs. Ferry Co. ,11 Wall. 423.

As applied to cases in which the person or owner was without the State, but the property within the State, or in which the converse of the situation, the limitation of power is thus stated:

"The State has no jurisdiction to assess a tax as a personal charge against a non-resident."

Cooley on Taxation, 3d Ed., page. 24.

In Dewey vs. Des Moines, 173 U. S. 193, the property (real estate) was within the State; the owner was a non-resident. This Court stated the limitation as follows:

> "The State may provide for the sale of the property upon which the assessment is laid, but it cannot under any guise or pretense proceed farther and impose a personal liability to pay the assessment *or any part of it.* (Page 202.)
>
> "The power to tax is limited to persons, property and business within the State and it cannot reach the person of the non-resident." (Page 204.)

In Louisville Ferry Company vs. Kentucky, 188 U. S. 385, the property was without the State, the owner within; the tax was *in rem.* Page 396:

> "While the form, mode and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, the power is limited by a principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to the subject within the jurisdiction of the taxing government."

Baltimore vs. Hussey, 67 Md. 112.

> "The taxing power of a State must necessarily be limited to the taxation of persons and property within and subject to its jurisdiction, and if this be so the State can acquire no jurisdiction over the person of the appellee for the purpose of taxation, because she is a non-resident."

While the opinions of this Court contain many other general definitions of the taxing power and discussions of

its basis and character, still in all, the extent of the power, whether ascertained from the language of the definition or from a consideration of its character, is always stated subject to this limitation, *i. e.*, its existence as to any person depends on his residence, and on that only; the ownership of property does not extend it to a non-resident person any more than the residence of an owner extends it to extra-territorial property.

In every definition of the power its subjects are stated to the persons and things and business. The right to exercise it depends as to persons on their residence; as to things on their location. The phrase "within the State" is a separate qualification of each of the subjects. Residence is not alone the characteristic which distinguishes the taxable from the non-taxable person, but it furnishes the only distinction between the two, just as location is the only feature which distinguishes the taxable from non-taxable property. Residence and location have no cross or reciprocal influence—they are individual characteristics of separate subjects of taxation.

Property or its ownership cannot extend the power of taxation *in personam;* the person subject to the taxing power is the person who *resides;* not the person who resides *or* owns property within the State; ownership of property is not an element in the definition of the person.

It is to be noted, moreover, that if the limitation contended for by the plaintiff is not correct, then the oft-repeated definition must be changed so as to read as follows: The power of taxation extends to persons residing (or owning property) and things situate (or owned by persons residing), within the State. The portions included in the parenthesis would be necessary additions to the definition and cause real additions to the power.

The real taxing power is much more circumscribed. Considered with reference to its subjects and form of exercise, we submit the following as a correct statement of its extent:

(1) Both the person and property may be within the State. The State has the full right of taxation *in personam* and *in rem*.

(2) The person may be in the State, the property without.

(*a*) A tax may be levied *in personam* against the person on the basis of his worth and the property included in ascertaining ~~his~~ the worth.

Coe vs. Errol, 116 U. S. 517, at 524.

(*b*) The property so without the jurisdiction cannot be taxed *in rem* either directly or indirectly.

Louisville Ferry Co. vs. Kentucky, 188 U. S. 385, 396, 397, 398.

The ferry company was incorporated under the laws of Kentucky. The State provided for taxation of its franchises; valuing them at an amount equal to the capitalization of its earnings at 6 per cent. Among other property the company owned a franchise granted by Indiana, whose situs was in that State. This Court held that though the company was a subject of the State of Kentucky, the tax was indirectly a tax on property out of the State and was not subject to its power.

To the same effect is:

Fargo vs. Hart, 193 U. S. 490, 498.

(3) The property may be within the State but the person without.

(a) The property is subject to a tax *in rem*. This is directly within the power.

(b) The State has no power to tax the non-resident owner *in personam*.

This last proposition is the one involved in this case.

We submit the following cases as deciding the precise question:

Dewey vs. Des Moines, 173 U. S. 193, 203, 204.

The State of Iowa, in providing for the taxation of real estate within its borders made the tax, a tax *in personam*

against the owner, and provided also that the property should be subject to the lien of the tax.

In holding this statute void the Court used the language above quoted, that while the State could tax the property and provide for its sale, "it had no power to impose a personal liability to pay the assessment of any part of it," (page 202) because its power "did not reach the person of the non-resident owner. (Page 204.)

City of New York vs. McLean, 170 New York, 374, at 387.

In this case the same rule was applied to a non-resident stockholder. M. was a citizen of the State of New Jersey; he was a stockholder of a New York corporation. The statute provided as here for the payment of the tax primarily by the corporation; it failed to pay and suit was brought against M. in New York.

The Court said, page 383:

> "That it (the Board of Assessors) had jurisdiction to assess the shares of stock belonging to him is not denied. Did it have such jurisdiction of his person as authorized it to make a personal assessment against him? We think not."

After citing Dewey vs. Des Moines, 173 U. S. 193, and the quotation from Cooley on Taxations, *supra*, the Court continued, page 387:

> "If the statutes of the State were intended to confer on the ~~affairs~~ same of the plaintiff authority to maintain an action against the defendant and to impose on him a *personal liability* for the payment of the tax *assessed on the shares of stock*, yet so far as they attempted to confer that right they were beyond the power of the State to enact." * * *

In delivering the opinion of the Appellate Division of the Supreme Court in the same case, (67 App. Div. 590,) the Court said (page 609):

"The same rule to be deduced in my judgment from all cases is that although a State has the power to levy a tax upon personal property of a non-resident situate within its boundaries and subject to its jurisdiction, and for that purpose may separate the situs of the owner from the actual situs of the property within the State and subject it to taxation because it is within the State, yet it can only enforce payment of that tax by virtue of its jurisdiction over property, and it has not by virtue of that jurisdiction any power to subject the owner of it to a personal liability for the tax."

The defendant placed great reliance on the two following cases. In neither case, we submit, was the question really involved.

Bristol vs. Washington County, 177 U. S. 133.

The State of Minnesota provided for a tax on debts secured by mortgage on property within the State.

A citizen of New York during a number of years invested largely in such mortgages; the tax was regularly assessed but never collected; the mortgages assessed were paid and released.

The mortgagee died owning a number of other mortgages on property in Minnesota. Ancillary administration was taken out on his estate to collect them. The State filed its claim against the estate in the Minnesota administration proceedings for payment in full under a statute which made taxes a preferred claim. The claim was sustained. Two questions were involved—

1st. Whether the State could fix the situs of such debts.

2d. Whether the tax claim was valid against any mortgages other than those against which the tax was specifically assessed.

The lien was sustained. The statute did however not purport to impose the tax on the owner or on all of his estate, but only on such other mortgages as had their situs within the State. These were clearly within its jurisdiction. The power over a non-resident person or extra-territorial subject was not even involved.

Tappan vs. Merchants Natl. Bank, 19 Wall. 490.

The State of Illinois by statute provided that the situs of the stock of national banks of all resident stockholders should be in the city in which the bank was located. It was contended that under the constitution of the State the situs was in the county in which they resided, and the law was therefore void as to residents. It was then further contended that as in this event resident stockholders could not be taxed the tax on non-residents would be a discrimination forbidden by the National Banking Act.

This was the only ground on which the validity of the tax on non-residents was challenged.

Argument of Chief Justice Fuller, page 497, bot.
Statement at pages 491 and 492.

The decision of the Court was based wholly on the provisions of the National Banking Act. This Act forms a part of the charter of the national banks and provides for this liability. Charters can and frequently do undoubtedly provide for a personal liability of stockholders in various forms; the liability to creditors of the corporation is one of the common illustrations, and the liability may be thus imposed for a tax as well as for any other debt or obligation.

The Court therefore held, page 500, that under the National Banking Act the shareholders were liable because that act "made it the law of the property." The liability arose not out of the taxing power of the sovereign, but from the subscription or charter contract of the subject. In defining the power of taxation (page 499) the Court prescribed the same limitations:

"If the State has actual jurisdiction of the person of the owner it operates directly upon him. If he is absent and it has jurdiction of his property, it operates on him through his property." The Act we are discussing operates precisely conversely, *i. e.*, it operates directly on him, and on his property only through him and by the personal obligations imposed on him.

That this decision was based wholly on the National Banking Act and that State statutory or constitutional provisions relating to taxation of corporations or shareholders are not the law of the property in this sense and do not have this effect, was expressly decided by Justice Field in

County vs. South. Pac. R. R. Tax Cases, 15 Fed. Rep., 753, bot. and 754.

A consideration of the source or basis of the power moreover equally shows the same limitation. The power is, of course, one of the powers of sovereignty. The States of the United States are equal sovereigns. This equality of powers imposes a limitation on the powers of each. These limitations are territorial.

Cooley on Const. Limit., pages 3 and 4.

The plaintiff is beyond these limits, *i. e.*, in Pennsylvania; the powers cannot be extended to him, because the sovereignty and the power incident to it are in their nature incapable of territorial extension.

But while the powers of a State cannot be so extended to him it may be suggested that as the property is within the State, the State can, and has, as a condition of the right to hold it, required his subjection *in personam* to its taxing powers, and by acquiring the property he has brought his person within its jurisdiction and power.

It is, of course, true that an alien has no right to acquire and hold property, and that his subjection *in personam* can

be exacted by a fully sovereign power as a condition of the removal of the disability of alienage. The States of the United States are, however, prohibited from imposing such a condition by the provision of the Federal Constitution, which guarantees to the citizens of each State the privileges and immunities of the citizens of the several States. The right to hold property is one of these privileges. This provision is not intended to give to the citizen of one State the right to subject himself to the sovereign powers and become a citizen of another, and thus obtain the privilege of holding property as such citizen; but it guarantees to him this right without so subjecting himself, *i. e.*, as a citizen of another State; it is a privilege he has not as a subject but as an alien.

It may be suggested that as this constitutional provision is intended only to prevent discrimination between residents and non-residents, and that as resident property holders are subject to the power to tax *in personam* it can require the same subjection from a non-resident. Such a contention is unsound for various reasons:

1st. This would be an assumption of the controverted question. The exemption of a non-resident from a tax *in personam* is due not to any rights of a non-resident, which he can waive, but to the want of power in the State; the question is the existence, not the operation of the power; there can be no subjection to a non-existing power, especially no implied subjection.

He can, of course, so subject himself, but only in one way, *i. e.*, by changing his status from non-resident to a resident, and thus bring himself within the class of subjects to which this power extends.

2d. The right of a State to tax its citizens or residents *in personam* exists by virtue or on account of their residence, not on account of any property holding; this alone is the basis or source of the power. If the holding of the property imposes on the non-resident this liability to personal

taxation, it imposes on him an obligation which it does not impose on a citizen or resident, and is a prohibited discrimination.

3d. While a State may, notwithstanding the constitutional guarantee prescribe a variety of conditions under which such privileges may be enjoyed by a non-resident, and require him to submit to a number of conditions under which its own citizens enjoy the same privileges, there is one condition or duty of the citizen or resident to which the non-resident is not obliged to submit, *i. e.*, his personal subjection to its sovereignty. This is the exact requirement which the constitutional provision was intended to prohibit; as the right is guaranteed to him as an alien and non-resident, *i. e.*, without this subjection to its sovereignty.

Pennoyer vs. Neff, 95 U. S. 733.
Paul vs. Virginia, 8 Wallace, 168, at 180.
Carfield vs. Coryell, 4 Wash. C. C. 380.
Slaughter-Houses Cases, 16 Wallace, page 30, at 76.

It is to be noted that this prohibition, to whatever extent it exists, applies to every exercise of the State's sovereignty whether by constitutional provision or by Act of the Legislature.

The above discussion has related merely to the existence of the State's power to so require personal subjection to its taxing power as a condition of enjoying rights to hold property. It is true, however, that even if it had the right, mere provisions for taxation in its constitution and statutes such as are here involved would not indicate an intention to exercise such power.

This was expressly decided in—

County vs. South Pac. R. R. Tax Cases, 15 Fed. Rep. 753, 754

A consideration of the possible limitations of or the occasion for such a power to tax non-residents *in personam* lead to the same conclusion.

Obviously the power to impose a tax *in personam* on the non-resident cannot be unlimited; this would totally disregard the distinction between residents and non-residents.

If, however, as to a given subject it exists at all, then "it is a right which in its nature knows no limits."

Weston vs. City, 2 Peters, 466.

While taxes *in rem* impose their own limitations, taxes *in personam* from their nature cannot; nor is limitation based on any principle possible.

If there can be a limitation it must be the value of his property. But this limitation itself shows the want of any occasion or necessity for the power over the person. The State has full jurisdiction over that on account of its location; to fully subject that to every lawful tribute no power to tax *in personam* is necessary. It can be "useful only for abuse." If the property is not of sufficient value to enable the State to realize the tribute which it exacts in return for its protection, that means that the power of taxation is really being used for the purpose of spoliation. If the property is so intangile and elusive, that no law can be devised to successfully seize it, that alone proves that it is too intangible and too clearly inseperable from the person of its owner to justify localization. Contentions about the limits of the tax power really only arise out of the attempts to tax property, properly subject to taxation elsewhere or already taxed in the same jurisdiction or entirely exempt.

While this Court cannot deny to a State a power simply because it is capable of abuse, still if the question of the existence or extent of a power is even doubtful the facts that it is useful or necessary only for abuse is always a material consideration.

II.

That the capital stock tax imposed by the revenue laws of the State of Maryland is a tax in personam on the stockholder, not a tax in rem on his shares.

The distinction between these two classes of taxes was recently discussed by this Court in Leigh vs. Green, 193 U. S. 79, at 90, 91. It is of special importance only as to non-resident stockholders.

In the character of its taxes Maryland differs from every State of the Union. In a recent treaties on taxation the taxes imposed by the different States are classified according to their character. A special class was provided for Maryland taxes alone.

27 Am. and Eng. Encyc. Law, 632.

The character of this tax is fixed by—

First. The express language of the statute as construed by the Court of Appeals of the State.

We concede that if a law imposing a tax should limit the power to enforce it to a sale of the property or contain similar limitations on its extent, that then any expressions in the Act descriptive of its character might be disregarded, not because the tax would be a valid tax *in personam*, but because, notwithstanding its form, it would in substance be a tax *in rem*.

On the other hand there can be no question that a State having the power to levy several classes of taxes may itself define the class to which a particular tax belongs. It is merely a question of whether the intention to so classify it is sufficiently clearly expressed.

That the State of Maryland has done this is our contention in this connection.

The statutory provisions relating to the taxation of shareholders are found in

Code, 1888 (re-codified 1903), Art. 81, Sects. 2, 90, 150, 151, 153, 159, 162.

They are too voluminous to be reproduced here as a whole. A statement of the substance or extracts of the essential portions are sufficient.

Of these, section 150 fixes the situs; sections 151 and 153 provide for annual reports to appropriate officials.

Section 2 provides: "All shares of stock in any corporation incorporated under the laws of this State shall be valued and assessed for State, county and municipal purposes to the owners in the county in which they reside."

Section 90 fixes the time for the payment of the tax and provides that they shall be paid by the corporations "whether they shall have declared dividends or earned profits or not."

Section 162 provides for the ascertainment of the taxable value of the shares and "that the taxable value of such shares * * * owned by residents of this State shall for county and municipal purposes be valued to the owner thereof in the county or city in which such owners shall reside and said taxable value of such shares as are held by non-residents shall be valued to the owners thereof in the county or city in which said bank or other corporation is situated; but all county and municipal taxes assessed upon the said taxable value of such shares shall be collected from such bank or corporation and when so paid shall be charged by such corporation to the accounts of such stockholders."

Section 159 makes the same provision as to State taxes, and also provides "That the shares shall be valued at their actual cash value; but in no case shall the stock of any corporation in the aggregate be valued at less than the full value of the real estate, chattels real or personal belonging to the corporation in the State."

In other portions of the article, relating to annual reports, penalties of officers, etc., the tax is indiscriminately referred

to as a tax on shares or on shareholders. A discussion of the language of the statute can serve no useful purpose. The one thing that can with certainty be said is that it does not clearly fix the character of the tax. While if the question were one of first impression the tax might with almost equal reason be held to be a tax on the corporation or on its shares or on its shareholders, the Court of Appeals has by repeated decisions, in language too clear to be mistaken or admit of doubt, fixed the character of the tax, as a tax, purely *in personam*.

Article 15 of the Declaration of Rights of Maryland provides that—

> "Every person within the State or holding property therein ought to contribute his proportion for the support of the government, according to his actual worth in real and personal property."

This differs from the definition of the general sovereign power of taxation. It confines the taxing power to one subject, *i. e.*, person; it eliminates one authorized subject and makes an unauthorized extension of power as to the other. It has been so construed by the Court of Appeals in the following cases:

> Monticello Co. vs. Baltimore City, (1900), 90 Md. 416, at 425-6.

By the Act of 1892, chapter 704, distilled spirits in bond were made subject to general taxation. In disposing of the contention that the tax was on property and as such void, the Court said, (page 425):

> "Taxes of the kind here dealt with" (annual taxes on personal property) "are, under Article 15 of our Declaration of Rights, levied *not* on *things*, but on the *owner* of things, and the value of things owned fixes the measure of the owner's liability to contribute in taxes towards the support of the government. This is an axiom of political economy no less than a fundamental provision of

our organic law. (U. S. Elec. Power Co. vs. State, 79 Md. 63.) It cannot, therefore, be assumed that the Legislature deliberately intended to disregard this principle and to place the tax on spirits and not on the owners of them." The Court then quoted the provision of the Declaration of Rights above stated and continued: "It is the *individual* then who is in the State or holds property therein that is liable to taxation. He may be out of the State, he may be a non-resident, but if he has property situate here he is as much bound to contribute to the support of the government, according to the value of that property, as though he were permanently domiciled within the limits of the commonwealth. Whatever the language of the statute may be it must bend to this paramount law. * * * Though the language employed like that used in many of the other assessment laws if read literally would indicate an intention to impose the tax on property and not the owner of it; that is not its meaning when considered in connection with the settled policy of Maryland as announced in the Declaration of Rights. We hold then that the tax is upon the owner of the spirits and not specifically upon the spirits."

In Carstairs vs. Cochran, 95 Md. 495, pages 500, 501, (affirmed on another point by this Court, 193 U. S. 10), the Court of Appeals repeated and expressly approved the language of the above quotation.

Prior to the above decision the character of the tax imposed by the above statute has been decided by the same Court, simply as a question of the construction of the statutory provisions without reference to the provision of the Declaration of Rights.

Tax Cases, 12 G. & J. 117.

Approved in Appeal Tax Court vs. Patterson, 50 Md. 354, at 368.

"Non-residents of the State are liable to the tax in respect of stock held in the banks of this State as well as residents."

U. S. Elec. L. & P. Co. vs. State, 79 Md. 63.

In addition to the regular tax on its stockholders the State had imposed on the company a gross receipt or franchise tax. It was contended that the general tax was a tax on the stock, of which the franchise was the substantial element of value; that the franchise tax was an indirect attempt to impose a double tax. The Court held (page 70):

> "The tax upon the shareholders is not a tax upon the *stock* or upon the *corporation*, but upon the *owners* of the shares of stock, though the officers of the corporation are made agents of the State for the collection of the tax. The shares belong to the stockholders respectively and individually, and when for the sake of convenience in the collection of the tax the corporation pays the tax upon these shares into the State Treasury, it pays the tax not upon the company's own property, nor for the company, but upon the property of each shareholder and for each shareholder by whom the company is entitled to be reimbursed. * * * Hence, when the owner of the shares is taxed on account of his ownership and the tax paid for him by the company the tax is not levied upon or collected from the corporation."

It will be noted that this case is cited in the Monticello case *(supra)* as involving the same question there presented and authority for its decision.

The above quotation was repeated and approved in—

Crown Cork & Seal Co. vs. State, 87 Md. 696.

To the same effect are

Clark Dist. Co. vs. Cumberland, 95 Md. 469, at 477.

Hull vs. Southern Devel. Co., 89 Md. 8, at 10 and 11.
Donovan vs. Ins. Co., 30 Md. 155.
American Coal Co. vs. Co. Comars. 59 Md. 185.

The latter might not alone be sufficient to fix the character of the tax. In some and in other cases not cited the terms, tax on shares and tax on shareholders, are indiscriminately used. A distinction between the two was not required by the facts. The question involved and decided was that the tax was not on the corporation or its property. The actual distinction between the two was, we submit, required and drawn by the cases from which the quotations are made.

The character of the tax is also shown by—

Second. The method of ascertaining the value of the shares or the basis of the tax.

The statute after directing (article 81, sections 162, 159) that the shares shall be valued at their real value, taking into consideration the total value of the company's property, provides further:

> "But in no case shall the stock of any corporation be valued in the aggregate at less than the full value of the real estate, chattels real and personal belonging to the corporation in the State."

This proviso is, in fact, and forms in practice, the whole rule for valuation; it is a prohibition against deducting from the aggregate value of the company's property, the amount of its debts. It provides for a distinction between real or actual value, and assessable value. In a real valuation there are but two elements; one, the aggregate value of the company's property; the other, the amount of its debts. This proviso eliminates one. Both of the elements are equally necessary in a real rule for valuation; as much so as in a problem of subtraction. The one eliminated forms the only distinction between the value of the company's property and

of its shares. It is a real rule for valuation only when applied to a corporation which has no debts; that class of corporations scarcely exists.

An illustration of the application of this rule to the large number of local manufacturing or merchandising corporations is instructive. Suppose a corporation has

Machinery, merchandise, etc., valued at		$2,000,000
Bond issue or debts of.....	$1,000,000	
Capital stock.....	1,000,000	
		$2,000,000
The real value of the stock would be, par.....		$1,000,000
The assessable value would be		$2,000,000

Nor is this all. If the $1,000,000 in bonds are in the hands of residents, they are also subject to taxation and the corporation is required to deduct the tax from the interest.

Code, 1888, Revis. 1903, Art. 81, Secs. 94, 214.

That the tax on the whole property should be paid is immaterial. The obligation of the non-resident to contribute to the support of a State arises out of his property; it is a tribute exacted in return for the State's protection. The stockholders' interest in the State is limited to the real value, not the assessable value of his stock. The total withdrawal of the State's protection could inflict on him no loss in excess of this real value. The protection and tribute are reciprocal duties. As this value limits the extent of the protection it should equally impose a limitation on the tribute.

This rule for ascertaining value can, we submit, be accurately described by but the single phrase, purely arbitrary. Our illustration above given is fairly typical; but whether it is or not is quite immaterial. Disregard of the statutory rule by the Tax Commissioner, skill of the corporate returning officers at evasion or suppression, or accidental situations in the corporation's affairs, may reduce the difference

between the real and assessable valuation. Two things only are certain—*i. e.*, that except in the case of a corporation having no debts, the value ascertained under the statutory rule can never be correct; this rule, moreover, limits the minimum; it must, therefore, err on the side of excess.

In Bank vs. Commonwealth, 9 Wall. 353, the tax assailed was a fixed rate on the shares at par. It was contended that this was a tax on the bank itself. This Court, page 360, said that the mere fact that the assessment or basis of the tax had no real relation to the amount of the bank's assets was itself sufficient to show that it was not a tax on the bank. So we here contend that there is absolutely no relation between the actual and assessed value of the shares conclusively shows that the tax is not on the shares.

Third. The character of the obligation imposed furnishes another index of the character of the tax.

(*a*) The obligation to pay is imposed on the corporation; this, however, is not an obligation as tax payer, but as tax collector; the primary tax obligation is on the shareholder.

Hull vs. Southern Del. Co., 89 Md. 8, at 10, 11.
U. S. Electric Light and Power Co. vs. State, 79 Md. 63, at 70.
Casualty Insurance Co. Case, 82 Md. 535, at 563, 564.

The shareholder is however required to refund to the corporation the tax so paid. Article 8, section 162, provides: "And when so paid shall be charged to the account of such stockholder." (By the Act of 1902, Ch. 468, the wording is changed to "shall or may." While this is not material as to whether the tax is on the stock or stockholder, it may be noted that this Act was passed after the tax sought to be enjoined was levied.)

"The Company pays the tax * * * for each stockholder respectively by whom it is entitled to be reimbursed."

U. S. Elec. Light & P. Co. vs. State, 79 Md. 63, at 70.

Hull vs. South. Dev. Co. 89 Md. 8 at, 10, 11.

The tax then imposes first a tax obligation on the shareholder to pay, then on the company to collect and pay over, and when so paid an obligation on the shareholder to the company. The obligation of the shareholder to the company is necessarily identical in extent with that of the corporation to the State; any lesser obligation could not provide a reimbursement, and it would, as to the difference or excess, amount to a tax on the company.

(*b*) The obligations are in no way restricted in extent to dividends or to the stock. Thus, article 81, section 89, expressly provides that the tax shall be paid by the corporations "whether they shall have declared dividends or earned profits or not."

In Houston vs. New Orleans, 119 U. S. 265, at 276, 279, this Court held that this identical provision was sufficient to show that the tax was not a tax on shares.

The taxes are not even restricted to the value of the stock; it is not even necessary that the stock really exist; the company may be wholly insolvent, still the artificial valuation must be made and the tax paid. This exact situation existed in

Casualty Insurance Co.'s Case, 82 Md. 535 at 563, 564.

And in deciding that the tax was not only payable, but payable as a prefered claim, the Court said, pages 562-4:

> "These taxes cannot, of course, be considered a debt due by the company unless they are made so by statute, because the shares of stock are the property of the shareholder, and under the Code must be valued to

him." The Court then discusses and decides that the company is liable as a collector, and continues: "If these taxes are a debt due by the corporation they are a debt due by it to be paid regardless of any dividends or profits out of which it might be reimbursed. Though this is conceded to be so while the company is a going concern, the contention is that when the company becomes insolvent and its property has passed into the hands of a receiver such taxes cannot be held to be a debt of the corporation for which its assets are liable. In reply to this it may be observed that the tax is, by the express terms of the statute, charged to and made payable by the corporation."

In Stapleton vs. Haggard, 91 Fed. Rep. 93, 95 (Circuit Court of Appeals, 5th Ct.), it was decided that if the tax be really one on the shares it is not recoverable in the event of the company's insolvency. This is necessarily correct where the tax is really on shares.

(c) The tax is, moreover, recoverable in assumpsit. This if there were no other would be a sufficient index to the character of the tax obligation.

In Maryland all taxes are so recoverable.

"The imposition and assessment of the tax creates a legal obligation on which the law raises an implied assumpsit." When ~~after~~ new or summary remedies are provided they are merely cumulative.

Dugan vs. Mayor and C. C. of Baltimore, 1 G. & J. 499, at 502-3.

Mayor, etc. vs. Howard, 6 H. & J. 383, at 394.

This rule has been made expressly to apply to the stock taxes imposed by the provision of the Code under discussion.

Hull vs. Southern Dev. Co. 89 Md. 8, at 11.

Casualty Ins. Co. Case, 82 Md. 535, at 564.

American Coal Co. vs. County Commissioners, 59 Md. 185, at 197.

No other remedy, such as a proceeding for seizure and sale of shares is provided.

(e) This tax it is to be noted is not a tax on the corporation itself.

While the considerations above discussed show that the tax cannot be a tax *in rem.* on the shares, some of them tend to show it to be a tax on the corporation; and in the case of Houston vs. New Orleans, 119 U. S. 265, the tax, for the reason cited, and for an additional reason (pages 278-9), so declared. As to such a tax some of the considerations discussed would not be objections. If such were the character of the tax it would exclude from the valuation and assessment property already taxed elsewhere, such as real estate in another State; property already taxed in this State or exempt by its contract, such as the State's own bonds, or universally exempt, such as bonds of the United States, all of which under the revenue law as construed by the Court of Appeals can be and are included in the valuation of the shares. The State may, therefore, prefer to avoid the limitation of such a tax. This Maryland has done.

Whether or not, however, this statute does provide a tax on the corporation is a mere question of construction. Upon this the decision of the Court of Appeals is final. That the tax is not on the corporation is a question free even from doubt.

Donovan vs. Ins. Co., 30 Md. 155, 160.

Hull vs. South Dev. Co., 89 Md. 8, at 10, 11, *supra.*

U. S. Elec. L. & P. Co. vs. State, 79 Md., 63, at 70, *supra.*

Crown Cork & Seal Co. vs. State, 87 Md. 696.

Clark Distill. Co. vs. Cumberland, 95 Md. 468, at 476-7, *supra.*

We submit, therefore, that the tax is on the stockholder *in personam*, quite as much as if the Legislature had added

another section to Article 81, reading as follows: Provided, however, that as the State can levy taxes "not on things but on the owners of things," (Monticello vs. Baltimore), the tax above imposed is "not a tax on the corporation nor upon its stock, but on the owner of shares of stock," (U. S. Elec. L. & P. Co. vs. State), and shall be assessed on a valuation of shares having no relation to their real value, (except to always exceed it), and shall be paid even if for a single year it exceeds the value of the shares, (Casualty Co's case), and be recoverable from the shareholder in assumpsit, (Hull vs. South. Dev. Co.)

III.

That the tax is levied without due process of law and is therefore in conflict with the Fourteenth Amendment to the Constitution.

In the consideration of this contention the residence of the shareholders and character of the tax are immaterial.

The State makes no provision for notice or opportunity to be heard to the stockholders. It provides for a return by the officers of the corporation to the State Tax Commissioner (section 163); for the valuation by him (sections 151, 159, 162); for notice to the corporation of the assessment and an appeal by it (section 165); but no appeal or hearing at the instance of the stockholders is provided for, although the tax is upon them or their shares and not on the corporation. The validity of the assessment depends on the sufficiency of the notice thus provided for.

The tax assailed is a general tax.

Just what due process of law is, in a given proceeding, depends so much on its character and object that an extended examination of all the cases in which the term has been defined can serve no useful purpose.

The Court has recently said:

> "Exactly what due process requires in an assessment of a general tax has never been decided by this Court."
>
> Turpin vs. Lemon, 187 U. S. 51.
> Glidden vs. Harrington, 189 U. S. 255.

In Cooley on Taxation, pages 363-4, the requirements are in general terms stated as follows:

> "Tax proceedings are not in the strict sense judicial. But they are *quasi* judicial, and as they have the effect of a judgment the reasons which require notice on judicial proceedings are always present when the conclusive steps are to be taken. Provision for notice is therefore part of the 'due process of law' which it has been customary to provide for these summary proceedings, and it is not to be lightly assumed that constitutional provisions carefully framed for the protection of property rights were intended or could be intended to sanction legislation under which officers might secretly assess the citizen for any amount in their discretion without giving him any opportunity to contest the justice of the assessment. It has often been very pointedly and emphatically declared that it is contrary to the first principles of justice that one should be condemned unheard, and it has also been justly observed of taxing officers that 'it would be a dangerous precedent to hold that any absolute power resides in them to tax as they may chose without giving any notice to the owner. It is a power liable to great abuse.' And it might safely been added that it is a power that under such circumstances would be certain to be abused. The general principles of law applicable to such tribunals oppose the exercise of any such power."
>
> Cooley on Taxation, pages 363, 364.

Mr. Justice Field, in delivering his great judgment in the Railroad Tax Cases, 13 Fed. Rep. 752, said:

> "But in the taking of property by taxation, the proceeding is more summary and stringent. The necessities of revenue for the support of government will not admit of the delays attendant upon judicial proceedings in the Courts of justice. The statute fixes the rate of taxation upon the value of the property and appoints

officers to estimate and appraise the value. Due process of law in the proceeding is deemed to be pursued when, after the assessment is made by the assessing officers upon such information as they may obtain, the owner is allowed a reasonable opportunity, at a time and place to be designated, to be heard respecting the correctness of the assessment and to show any errors in the valuation committed by the officers. Notice to him will be deemed sufficient if the time and place of hearing be designated by statute. But whatever the character of the proceeding, whether judicial or administrative, summary or protracted, and whether it takes property directly or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice and offer to the owner an opportunity to be heard or the proceeding will want the essential ingredient of due process of law."

While this Court has declined to fix these requirements by definition yet by the process of "judicial inclusion and exclusion" the following requirements have been established for due process of law in an assessment for general taxation.

Some opportunity must be afforded the owner to question the validity or amonnt of the assessment.

The notice need not be personal, but it may be by publication, or a statute may give notice by fixing the time and place of hearing.

Winona & St. Peter L. Co. vs. Minnesota, 159 U. S. 526, at 536.
Merchants Bank vs. Pa., 167 U. S. 461, at 466.
Pittsburg Ry. vs. Backus, 154 U. S. 421, at 425.

The time and place for hearing must be in some way prescribed.

Railroad Tax Cases, 92 U. S. 575, at 610.
Plamer vs. McMahon, 133 U. S. 669.
Hagar vs. Reclam. Dist., 111 U. S. 701, 710.
See also—Monticello Co. vs. Balto., 90 Md. 416, at 428.

We submit that the proceedings in question are not within these requirements:

1st. The assessment of shareholders is not embraced in the general assessment law. The provisions for hearing and notice provided for in the general assessment law of property are not applicable to the assessment of the shareholders. This assessment is the subject of the special proceeding before the State Tax Commissioner. His decision (subject only to the appeal provided for to the treasurer and comptroller) is final. It is not subject to be controlled by the Courts even in case of mistake.

Salisbury Bldg. Assn. vs. Wicomico Co., 86 Md. 615, 621, 622.

Clark Distilling Co. vs. Cumberland, 95 Md. 468, at 474, 475.

2d. There are two steps in the assessment under this special proceeding—the original assessment and appeal. At neither is an opportunity to be heard accorded to the stockholder.

(*a*) *The Assessment.* By Article 81, section 153, the corporate officers are required to make a return of the value of the shares on or before March 15 of each year, and the State Tax Commissioner is required to assess them on or before May 15th. Section 151 authorizes him to examine under oath any officer of the company or any other witness.

It is manifest that no hearing on this original assessment is even contemplated. The corporation may make its return on any day between January 1st and March 15th. The commissioner may make the assessment immediately on the day of the return or on any day prior to the 15th day of May. No time is provided during which such return shall remain in his office subject to inspection. No publication of any notice is required. Whom he shall hear or whether he shall hear at all is left to his dircretion by section 151. Only on one theory could these sections be held to afford an

opportunity to stockholders to be heard, *i. e.*, that the office being a public one, any citizen has a right to enter and ascertain whether the return has been made. If this were true no question of due process of law in any proceeding could arise. The question can only arise as to proceedings of a State, *i. e.*, public proceedings conducted by public authority. To all such proceedings any citizen has as much unrestricted access as to this. Such mere right of access cannot therefore afford the opportunity and notice required.

Some form of notice of the time is equally required. This may be prescribed by statute, but some degree of certainty is required. As the corporation may make its return on January 2, and the Commissioner make his assessment at once, or at any time up to May 15. Only constant attendance for five and one-half months would assure an opportunity to be heard before the assessment is made. As this attendance would be the right equally of the thousands of stockholders of all the corporations of the State the mere physical limitation of space would make such an opportunity illusory. It is manifest therefore that no hearing before assessment, other than the corporate return, was contemplated.

In construing a statute almost identical, Act 1892, chap. 704, providing for the return to and assessment of spirits by the same officer, the Court of Appeals so held.

Monticello Co. vs. Baltimore City, 90 Md. 416, 428.

> "It (this act) does not authorize the Commissioner to accord any hearing at all, and in this particular differs verbally from the Pennsylvania statute under review in
>
> Merch. & M. Bk. vs. Penna., 167 U. S. 461;
> R. R. Tax Cases, 13 Fed. Rep. 750."

(*b*) *The Appeal.* By Art. 81, Sec. 165, the Commissioner is directed to send by mail to the corporation a notice of the assessment when made. The corporation is given a right of appeal to the Commissioner, the treasurer and comptroller;

the right of appeal exists only where actually provided for, and it is here restricted to the corporation. Even if it be assumed that the stockholder had the right to appear at the hearing this would be illusory since the corporation has control of the appeal and can dismiss it absolutely or conditionally to effect a compromise. No possible construction of this right of appeal by the corporation could deny to the majority of the stockholders the right through the corporation to control it. This right would leave the affirmance of change of the Commissioner's ruling not to the three public officers, but to the majority stockholders.

As the time for the appeal is determined by the assessment; and the hearing may be at once or not, the time for hearing the appeal is as uncertain as that of the assessment.

3d. If any notice or opportunity is provided by the statute to the stockholders it can only be on the theory that the notice to corporation is notice to the stockholders.

The Court of Appeals has so decided.

Clark Distill. Co. vs. Cumberland, 95 Md. 468, at 475.

But the question of what constitutes an opportunity to be heard, or due process of law; the elements of such opportunity or due process, are federal questions on which the Supreme Court would not consider the decision of the State Court conclusive.

State Bank vs. Knoop, 16 How. 391.
Wright vs. Nagle, 101 U. S. 793, 794.
McCullough vs. Virginia, 172 U. S. 109, 110.

We submit that the ruling of the State Court was not correct.

It is to be borne in mind that the entire basis of all systems of taxation of shares of shareholders, is the distinction between the corporation and the shares of stock or the

stockholders as such. Their effectiveness and validity depend on this consideration alone. No State has carried the distinction further or enlarged its powers and increased its revenue more on account of it than Maryland. There can be no reason for considering the corporation and shareholder separate and distinct for purposes of extending taxation and identical for purposes dispensing with notice. The stockholder is obliged to pay tribute, the State to give notice. The right of the tribute is dependent upon the notice. It cannot be that for the purposes of imposing on the stockholders the obligation to pay, the two are distinct, for depriving him of notice they are identical.

We do not, of course, deny that the State may provide for notice of any assessment on the local agent of a non-resident owner. But there must be a real agency. The one relation which it has been uniformly held does not exist between the corporation and stockholders, or *vice versa*, or among the stockholders, is that of principal and agent, especially with respect to the separate individual interests represented by the shares.

Cook on Corporations, Sec. 11.

In this State, moreover, and for tax purposes, the corporation is the agent of the State, not of the stockholder.

Thus in Hull vs. Southern Development Company, 89 Md., 8, at 10, the Court said:

> "The corporation is for the sake of convenience made the agent of the State and county to collect." (Page 11.) "It is the State's tax collector."

See, also, cases *supra*.

That the State can, for the purpose of creating a debt by statute, make its own agent and collector the agent of the intended non-resident debtor to admit service and notice is, we submit, inconceivable. As well might it make its treasurer, or any of its other agents or tax collectors, the agent

of the tax payer for the sake of the convenience of dispensing with notice, or avoiding nice constitutional questions. It would be a vast advance in substituted service.

If this power of creating agencies exists, it is difficult to find a limitation which would prevent its use to subvert fundamental principles.

In Merchants N. B. vs. Penna., 167 U. S. 461, the validity of a statute providing for a system of taxation of shares very similar to the Maryland statute was assailed. In stating and disposing of the objection, this Court said (page 466):

> "A final objection is that there is a lack of due process of law, in that the property of the shareholders is subjected to an ad valorem tax, without an opportunity given to them to be heard as to value. It is true that the statute contemplates no personal notice to the shareholder, but that he has never been considered as essential to due process of law in taxation. The statute defines the time when the bank shall make its report to the auditor-general, and it specifically *directs* him to hear all *stockholders* who may desire to be heard."

This fixing the time for the report by the corporation and the opportunity to the stockholders to be heard are the two things which in the opinion of the Court prevented it from being invalid. These are just the provisions not contained in the Act in question and which distinguish it from a valid tax. In this case, moreover, the tax is a personal tax, while in that case it was *in rem* on the shares. This is an additional reason for requiring that the opportunity to be heard be given to the stockholder.

IV.

That the Whole Tax is a Mere Nullity.

1st. If our contentions under Nos. I and II are correct then the Act of the Maryland Assembly imposes a per-

sonal obligation on a non-resident person, and imposes only that; it is, therefore, wholly *ultru vires* and void.

If the State has, because of self-imposed limitations of the Declaration of Rights no power to levy a tax *in rem* and no power to impose a tax *in personam*, because the person is out of the jurisdiction, then the law is necessarily void. The question of extent cannot arise; to discuss the extent of a non-existing obligation is a misuse of words.

The corporation cannot, therefore, be compelled, and has no right to apply the plaintiff's property towards the payment of a void obligation any more than the plaintiff himself can be compelled to pay it, nor can it obtain a lien on its property or shares by such payment.

This is not a case in which a tax or assessment is imposed first *in rem*, on property with the provision for a personal obligation of the owner as to any deficit or excess. The situation is exactly the converse. The personal obligation of the shareholder is the basis of every right or remedy for the tax. If the obligation is void, no remedy or right to enforce it can exist.

In other jurisdictions the first tax *in rem* might be valid and the excess void. In this State, however, by reason of the self-imposed limitations of the Bill of Rights, even a tax *in rem* would be void. Such twofold tax is, as we have undertaken to show, not the tax imposed or provided for.

That the above contention is correct is the necessary result of the authorities by which the first contention is supported and the character of that contention.

This exact point was moreover decided in—

Pennoyer vs. Neff, 95 U. S. page 714.

The State of Oregon had undertaken to provide for the collection of debts due by resident property holders to its citizens. The proceedings did not begin, however, with attachment or seizure of the property. They provided for a personal judgment against the non-resident. Under such a

judgment property situate in Oregon was seized and sold. Whether a valid title passed was then raised by an action of ejectment.

This Court held that the judgment and seizure were absolutely void even as to the local property. The exact question decided is shown by its statement, by Mr. Justice Field, page 727:

> "The want of authority of tribunals of a State to adjudicate upon obligations of non-residents when they have no property within its limits is not denied by the Court below, but the position is assumed that where they have property within the State is immaterial whether the property is in the first instance brought under the control of the Court by an attachment or other equivalent Act, and afterwards applied by its judgment to the satisfaction of demands against its owner or such demands be first established in a personal action, and the property of the non-resident be seized and sold on execution."

The Court held that such a contention was unsound and the judgment wholly void. See also fifth point in dissenting opinion, Mr. Justice Hunt, page 737.

We here respectfully direct attention to the fact that the injunction prayed for is to restrain the enforcement of payment by the corporation, because on such payment an unconditional personal obligation to refund will be imposed on the plaintiff—*i. e.*, the injunction is asked to restrain the creation of the personal obligation from the plaintiff to the corporation.

2d. If the statute does not provide for any due process of law as contended for in our III contention, then clearly the whole tax is necessarily void.

Under, therefore, either the I or II, or under the III contention, the tax is a mere nullity.

V.

The State and Federal Questions Involved.

That a federal question is involved is, we believe, conceded.

In the argument, especially the portion relating to the character of the tax imposed, portions of some decisions were relied on as authorities, the correctness of other portions denied. This is due to the difference in character of the questions involved.

The question of the kind and extent of the power the State is attempting to excercise, *i. e.*, the kind of the tax actually imposed by the revenue laws, whether it is on the corporation, the shareholder or the shares, are questions of the construction of the Maryland Bill of Rights and statutes. On these questions the decisions of the Court of Appeals are conclusive; it is as to these the Court of last resort.

Cleveland Tr. Co. vs. Landers, 184 U. S. 111.

Whether the State has the right to exercise the powers; or whether the exercise is *ultra vires*; whether it has the power to so tax a non-resident; whether the tribute exacted by its revenue laws is taxation or spoliation, is a federal question.

Dewey vs. Des Moines, 173 U. S. 193, 201.
Louisville Ferry Co. vs. Kentucky, 188 U. S. 385.
Fargo vs. Hart, 193 U. S. 490.
State Tax on Foreign held Bonds, 15 Wall. 300.
County of Santa Clara vs. Southern Pac. R. R., 18 Fed. Rep. 385, 392, 398-9, 407.

VI.

Propriety of the Remedy by Injunction.

The right of this remedy ~~is~~ not seriously questioned below.

The following considerations determine the question for the plaintiff:

1. The case presented is not that of a tax valid in part, excessive valuation or mere irregularity in assessment, but of a tax wholly *ultra vires, i. e.* on a subject not taxable by the State—a tax therefore which is mere spoliation and a nullity.

2. The tax purported to impose a lien on the shares, which lien would cloud the title and prevent a sale.

3. In Maryland, payments of taxes, even under protest, are voluntary and not recoverable.

Baltimore vs. Hussey, 67 Md. 116.
Baltimore vs. Lefferman, 4 Gill, 431.
Lester vs. Baltimore, 29 Md., 418.

4. The remedy is the appropriate one under the law of the State. There can, under these circumstances, manifestly be no adequate remedy at law in such a case and no other remedy could have been adopted by the plaintiff.

In County Commissioners vs. Union Mining Co., 61 Md. 545, at 545, the right to injunction was thus stated by the Court (Record, page 548):

> "It is only when the tax itself is clearly illegal or the tribunal imposing it has clearly exceeded its powers or the rights of tax payers have been violated, that the interposition of the special remedy by injunction can be successfully invoked."

Allegheny Co. vs. N. Y. Mining Co., 76 Md. 549, 554.

The remedy is peculiarly applicable to void taxation of shares of stock in cases in which payment by the corporation for the shareholders is required. This requires the distribution by it among all the cities or counties of a State. Any other remedy would require suits in each county involving the same question. The corporation's position in these

cases is that of stockholder or trustee for division and distribution, and the control of the discharge of its duties as such is peculiarly within the province of a Court of Equity.

Injunctions to restrain the taxation of shares, under statutes similar to the Maryland statute, were sustained by this Court in—

Cummings vs. Natl. Bank, 101 U. S. 153, 157.
Hills vs. Exchange Bank, 105 U. S. 319, 321.

Attacks on the validity of the tax laws on the ground that they were nullities though unsuccessful in the following cases that the proceeding was proper was not questioned by the Court.

Delaware Tax Case, 18 Wall. 206.
Adams Express Co. vs. Ohio State Auditor, 165 U. S. 194.
Savings Soc. vs. Multnomah Co., 169 U. S. 421.

In some cases a tender of the amount of the tax equitably due is a prerequisite of the right to injunction. Recent cases clearly defining the extent of this rule are:

People's Bank vs. Marye, 191 U. S. 272.
Fargo vs. Hart, 193 U. S. 490, at 502, 503.

In the latter case the Court said:

> "If there was no right to assess the particular thing at all and the assessments under such circumstances would be void, of course no payment or tender of any amount would be necessary before seeking the injunction."

This is the exact case presented here—*i. e.*, the taxation of a subject not within the power.

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